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# Cosio-Nava v. State Appellant's Brief Dckt. 43389

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,  
Plaintiff-Respondent,  
vs.  
MIGUEL COSIO-NAVA,  
Defendant-Appellant.

Docket No. 43389

**APPELLANT BRIEF**

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Brief of Appellant

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Appeal from the District Court of the Fifth Judicial District  
for the State of Idaho, in and for the County of Jerome

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Honorable John K. Butler  
District Judge

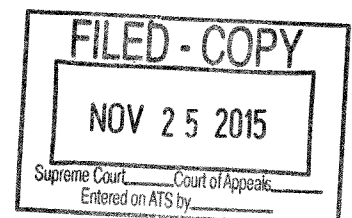
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## STATEMENT OF THE CASE

A. This is an appeal from a denial of the Appellant’s Petition for Post-conviction relief for ineffective assistance of counsel.

B. The Appellant filed a petition for post-conviction relief on November 20, 2014. A hearing was held on May 6, 2015 on the allegations contained in the petition. The court issued a memorandum decision on May 18, 2015, denying the Appellant’s petition.

## FACTS

On July 14, 2015 the outcome pleaded guilty to the crime of Domestic Violence, but felony pursuant to Idaho Code 18-903 and 18-918(2). In exchange for his plea, Mr. Cosio was to

receive a recommended sentence from state of Idaho which consisted of a three year fixed term of incarceration to be followed by a four-year indeterminate period of incarceration, along with a fine of \$2500. As long as Mr. Cosio was current with his treatment and attendance at AA meetings, the state would further recommend probation after completion of 30 days of County jail with work-release. At the time, Mr. Cosio is represented by Steven McRae a criminal defense attorney.

As part of the plea process, the court entered into a colloquy with Mr. Cosio regarding his rights. Part of this process involved in acquiring of Mr. Cosio with regard to his immigration status in the United States. At one point, the court inquired of Mr. McRae as to whether there were any immigration issues. Mr. McRae responded “Not at the present time, Your Honor, no. And we discussed that-we discussed that he is in the process of seeking to become a legal citizen and he understands that this can conflict with that.”<sup>1</sup> The court questioned Mr. Cosio regarding deportation and whether he “could” possibly be deported pending on his immigration status. The Court also informed of Mr. Cosio that he could lose your opportunity to become a citizen because of his plea. To this line of questioning, Mr. Cosio acknowledged and stated that he understood.<sup>2</sup>

On September 8, 2014, Mr. Cosio was sentenced and the court followed the terms of the plea agreement. On October 21, 2014, Mr. Cosio was taken into custody by Immigration and Custom Enforcement. The charging documents given to Mr. Cosio by immigration officials stated that he was subject to removal from the United States as he was a lawful permanent

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<sup>1</sup> Exhibit 102 at 8.

<sup>2</sup> *Id.* at 8-9.

resident who had been convicted of a crime of domestic violence and also for an aggravated felony.<sup>3</sup>

Mr. Cosio was then put into removal proceedings by immigration and was removed from the United States and returned to his native country about Mexico. Mr. Cosio filed a petition for postconviction relief claiming that his attorney did not properly advise him of the consequences off his plea as it pertained to his immigration status. At all times pertinent to this particular case, Mr. Cosio was a lawful permanent resident of the United States until he was remove back to Mexico. He was not a citizen. Mr. Cosio testified by way of telephone from Mexico and stated that his attorney did not advised in properly with regard to the immigration consequences of his plea.<sup>4</sup> Mr. McRae then testified and stated that he did inform Mr. Cosio of the immigration consequences off his plea. However, Mr. McRae did acknowledge that he informed the court that the immigration consequences facing Mr. Cosio involved a question as to whether Mr. Cosio would be eligible to receive citizenship, and made no comment the court with regard to the eventual loss of Mr. Cosio' legal resident status.<sup>5</sup> The parties then briefed the legal issues involved in the case, and the court rendered its decision, finding that Mr. Cosio had not received ineffective assistance of counsel. Mr. Cosio has appealed the decision of the District Court denying his petition for postconviction relief.

#### ISSUES ON APPEAL

I. The court erred in denying the Appellant's petition by not finding his attorney's representation to be deficient with respect to the impact his plea and sentence would have on the Appellant's immigration status as a lawful permanent resident.

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<sup>3</sup> See Clerk's Record at 39.

<sup>4</sup> Reporter's Transcript of Post Conviction Hearing at 10-13.

<sup>5</sup> *Id.* at 22-23; 26-27.

## ARGUMENT

### **I. The court erred in denying Mr. Cosio's petition for postconviction relief. Mr. Cosio established that his attorney was deficient in the advice given to him with regard to his immigration status and effect the same had on his immigration status.**

The standard of review for postconviction relief cases is governed by Idaho Code §§ 19-4901 through 4911. Additionally, postconviction relief proceedings are civil in nature and are therefore governed by the Idaho Rules of Civil Procedure.<sup>6</sup> “When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous.”<sup>7</sup>

In order to prevail upon a claim of ineffective assistance of counsel through a postconviction relief petition, the petitioner must establish that his attorney's representation was deficient, and that he was prejudiced by the deficiency.<sup>8</sup> When the accusation of ineffective assistance of counsel is based upon the entry of a plea of guilty, the petitioner must also establish that but for the plea of guilty, he or she would have insisted on taking the case to trial.<sup>9</sup>

This case has the added dimension of the question as to whether Mr. Cosio was properly advised of the immigration consequences of his plea. The United States Supreme Court has set forth the standard with regard to an attorney's duty with regard to informing the client with regard to the immigration consequences of plea. The standard set out in the case of *Padilla v. Kentucky* states as follows:

When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.<sup>10</sup>

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<sup>6</sup> *Dunlap v. State*, 146 Idaho 197, 199, 192 P.3d 1021, 1023 (2008).

<sup>7</sup> *Popoca-Garcia v. State*, 157 Idaho 150, 151-52, 334 P.3d 824, 825-26 (Ct. App. 2014)(citations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Padilla v. Kentucky*, 559 U.S. 356, 369, 130 S.Ct. 1473, 1483 (2010)

Given these standards, Mr. Cosio argues that the initial starting point with regard to analysis of this particular problem, has to center upon the immigration consequences of Mr. Cosio's plea.

Mr. Cosio pleaded guilty to a felony crime, domestic violence with traumatic injury, for which the maximum penalty is 10 years in prison and a \$10,000 fine. By pleading guilty to a crime which carried this type of penalty, Mr. Cosio put himself into the category that would automatically strip him of his lawful permanent residency in the United States. This category is what is known as an "aggravated felony" conviction. An "aggravated felony" is defined in 8 USC § 1101 (a) (43). For the purposes of Mr. Cosio's case the applicable definition is found in (F) of this subparagraph. It states that an aggravated felony is "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) which the term of imprisonment at least one year."<sup>11</sup> The two triggering factors for this definition are one, conviction for a crime of violence, and two, the imposition of a jail sentence of at least one year. Even though a prison sentence may be suspended and an individual placed on probation, the suspended prison time is sufficient to satisfy this definition and trigger immigration consequences for such a conviction.<sup>12</sup>

Under such a scenario, the immigration consequences of Mr. Cosio's plea would fall squarely into the second part of the *Padilla* definition of ineffective assistance of counsel. In other words, the immigration consequence was clear, and therefore, the duty to give more than just general advice was also clear. Mr. Cosio's attorney did not satisfy this particular obligation. As has been stated in this brief, during the plea colloquy, Mr. Cosio's attorney stated that there

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<sup>11</sup> The footnote to this code section states that wording was left out of this section which should state "... Is at least...".

<sup>12</sup> See *U.S. v. Banda-Zamora*, 178 F.3d 728 (5<sup>th</sup> Cir. 1999).

were no immigration consequences at this time. He then followed up this statement by clarifying that Mr. Cosio's plea would cause him to lose the opportunity at obtaining citizenship. This statement indicates that Mr. Cosio's attorney did not have an adequate understanding of the consequences which Mr. Cosio faced at the time he entered his plea.<sup>13</sup>

The court in its decision on Mr. Cosio's petition, states that Mr. McRae's testimony during the post-conviction hearing was credible and sufficient to explain the obvious contradiction of the statement given at the change of plea hearing. Mr. Cosio argues that more weight should be given to Mr. McRae's statement given at the time of the change of plea hearing, since that statement was near in time to any discussion between himself and Mr. Cosio with regard to immigration consequences.

There is a vast difference between stating that one will become ineligible to receive citizenship from being a deportable individual. Lawful permanent residents are allowed to live in this country as long as they desire, unless their activity places them in jeopardy of losing that residency. Filing an application to become a citizen, and having the same rejected, is not synonymous with being removed from the United States. They are as different as apples are from oranges. Representation to the court that Cosio was not facing any immigration consequences and that the only thing matter of concern would be that of losing the opportunity for citizenship simply did not reflect the truth of the situation. If Mr. McRae had indeed informed Mr. Cosio

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<sup>13</sup> See, e.g. Mora-Zamora v. Ashcroft, 41 F. App'x 969, 970 (9th Cir. 2002) "Mora-Zamora is removable and statutorily ineligible for cancellation of removal because he has been convicted of two aggravated felonies, as defined by 8 U.S.C. § 1101(a)(43)(F). [3] See id. §§ 1227(a)(2)(A)(iii), 1229b(a)(3). Mora-Zamora's contention that his prior convictions for harassment and domestic violence do not constitute aggravated felonies is without merit. See 8 U.S.C. § 1101(a)(43)(F) aggravated felony defined as crime of violence for which one year of imprisonment is imposed). Mora-Zamora's contention that because a portion of each of his sentences was suspended, he was not sentenced to one year of imprisonment, is similarly without merit. See 8 U.S.C. § 1101(a)(48)(B) term of imprisonment refers to the period of incarceration imposed by court regardless of a partial or total suspension thereof."



that he would be removed from the United States as a result of his plea and sentencing to the crime of domestic violence, then a statement confirming such a communication between Mr. Cosio and Mr. McCrea would've been the only answer pertinent and relevant during the change of plea colloquy with the court. The answer given by Mr. McRae to the court's question was not relevant to Mr. Cosio's predicament.

## **II. The Appellant demonstrated prejudice in his claim.**

The standard for ineffective assistance of counsel which is at issue in this case, was established by the United States Court and states as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.<sup>14</sup>

The United States Supreme Court further stated that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>15</sup>

The court in its interpretation of Idaho law leaves one with the impression that Mr. Cosio would have withdrawn his plea and proceeded to trial but for the deficient advice given to him by counsel. However the *Strickland* case does not view of the postconviction relief process as one that necessarily requires that a plea be withdrawn and proceed to trial. In fact, in the *Strickland* case, the defendant pleaded guilty to three murder charges. The alleged that his attorney did not present certain evidence at the sentencing hearing which resulted in the defendant receiving the death penalty. The court's examination of the facts indicate that the

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<sup>14</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)

<sup>15</sup> Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068.

result being sought depends upon the proceeding and in the case of *Strickland* the proceeding was a sentencing hearing as opposed to the option of trial.

Mr. Cosio argues that criminal defense cases generally fall into three categories. First, there are those cases which have a very good defense, and the likelihood that such cases would proceed to trial is very high. Second, there are cases which the defense to the charge is slight or almost nonexistent, and therefore the strategy in that case may be to secure a favorable outcome during sentencing after plea negotiations have resulted in an acceptable plea bargain. Third, there are other cases which fall into a mixed category where defenses to some portion of the case may be strong and weaker in other parts, and therefore there is more difficulty in determining whether a plea would be more appropriate or taking the case to trial would be the best option.

According to Mr. McRae's testimony during the postconviction hearing, it appeared that it was his opinion that the second option was the best available to Mr. Cosio. In other words, Mr. McRae did not believe that there was a viable defense to be presented at trial.<sup>16</sup> Consequently a strategy was adopted to secure a favorable sentence for Mr. Cosio after participation in some counseling.<sup>17</sup> Unfortunately for Mr. Cosio, his attorney did not take into account the most work factor in that sentence, which was the impact it would have upon his lawful permanent resident status. Therefore, under the *Strickland* standard the pertinent question would not be whether Mr. Cosio would have sought to have his plea withdrawn and gone to trial, but rather the inquiry should focus on whether but for counsel's performance in the case the outcome would have been different.

Mr. Cosio took this approach during the postconviction trial, by arguing that Mr. Cosio had other options available to him in his case. This argument was made to establish that there

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<sup>16</sup> Post Conviction Hearing Transcript at 19-20.

<sup>17</sup> *Id.* at 16-17.

was prejudice to Mr. Cosio which involved the particular sentence sought by his counsel. As the court stated in *Padilla*, where the immigration consequences clear, then there is a duty to advise the client as to that very same consequence. In this particular case, the consequence of deportation or removability from the United States was not in question. Mr. Cosio should have been advised of that fact, and that there were other options available to him. No effort was made by Mr. Cosio's counsel to ascertain whether there were other options available. During the postconviction hearing counsel for Mr. Cosio explained that there were other attorneys of whom he was aware, who could provide specific information with regard to this question. However at no time for any of those attorneys consulted in order to develop a strategy for sentencing case.<sup>18</sup>

The court further discounted of Mr. Cosio's argument during the postconviction hearing that if Mr. McCree had had a true understanding of Mr. Cosio's predicament, then he would have argued for a withheld judgment. The court in its memorandum decision stated that this would not have assisted Mr. Cosio, as he still would have had a "conviction" under immigration law. This statement is not accurate and is not a proper interpretation of an aggravated felony conviction under immigration law.

As stated earlier in this brief, 8 USC § 1101 (a) (43) requires two things for an individual to be convicted of an outdated felony under immigration law: First, the crime must be a crime of violence; Second, it must be a crime for which the term of imprisonment for a year or longer is imposed. The phrase "term of imprisonment" does not refer to the maximum penalty that could be imposed, but refers to the actual time given under any particular sentence.<sup>19</sup> In other words, if an individual pleads guilty to a crime such as domestic violence, but then is given a sentence of

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<sup>18</sup> Post Conviction Transcript at 23-24.

<sup>19</sup> United States v. Pimentel-Flores, 339 F.3d 959, 962 (9th Cir. 2003).

364 days in jail, he would not be guilty of an aggravated felony under immigration law because the sentence imposed was less than 365 days. Consequently, that individual also would not be removable because his conviction does not qualify as an aggravated felony under immigration law.

Pursuant to ICR 33(d) the court has the authority to withhold judgment when imposing sentence. In a case such as Mr. Cosio's a strategy could be adopted which would save his lawful permanent residency in the United States by petitioning for a withheld judgment. As long as the court did not impose a sentence of imprisonment, and placed the individual on probation, then an individual such as Mr. Cosio would not be removable, as long as he abided by the terms and conditions of probation. If the individual violated his probation and was brought before the court and because of a probation violation a term of imprisonment was then imposed, even though it may be suspended, he would then be subject to removal by Immigration and Custom Enforcement agents.

If such an option was to be exercised by Mr. Cosio's attorney, then his statement during the change of plea colloquy would be accurate, in that it would depend upon the actual sentence to be given by the court later date. However, in this case, Mr. Cosio's attorney did not petition the court for a withheld judgment nor did he seek any such recommendation through his negotiations with the state of Idaho. In fact, the strategy of adopted in this case appeared to be one of trying to live under the radar, and hope that immigration would be ignorant of Mr. Cosio's status after his sentencing.<sup>20</sup>

In *Padilla* the court stated that where the immigration consequences may be unclear, then an attorney has a duty to merely advise. However the court stated that where the consequences

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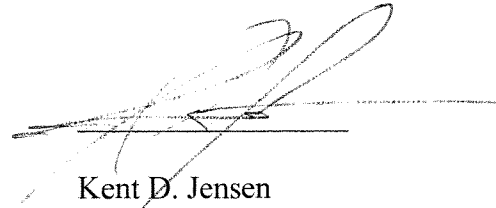
<sup>20</sup> See Post Conviction Hearing Transcript at 17-18.

are clear there is a greater duty. This is not a case where Mr. Cosio did not have any options. He clearly had options available to him with regard to a favorable resolution of this case in spite of his conviction. Those options were not pursued and he suffered the consequences.

#### CONCLUSION

It is therefore respectfully submitted that Mr. Cosio did not receive adequate assistance by his attorney and that he was prejudiced by the ineffective assistance of counsel.

DATED this 20<sup>th</sup> day of November, 2015.

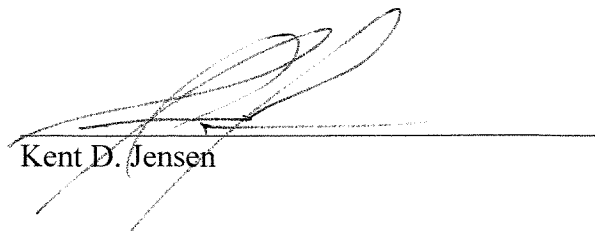


Kent D. Jensen  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of November, 2015, I served the foregoing **Appellant's Brief** to the attorney for the Plaintiff-Respondent by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

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